

1 MARK D. PETERSON (State Bar #126174)
2 CATES PETERSON LLP
3 4100 Newport Place, Suite 230
4 Newport Beach, CA 92660
5 Telephone: (949) 724-1180
6 Facsimile: (949) 724-1190
7 Email: markpeterson@catespeterson.com

8 Attorneys for Plaintiff
9 TRAVELERS PROPERTY CASUALTY
10 COMPANY OF AMERICA

11
12 **UNITED STATES DISTRICT COURT**
13 **FOR THE CENTRAL DISTRICT OF CALIFORNIA**
14

15 TRAVELERS PROPERTY
16 CASUALTY COMPANY OF
17 AMERICA, a Connecticut corporation,

18 Plaintiff,

19 v.

20 MEDVERSANT TECHNOLOGIES,
21 LLC, a California Limited Liability
22 Company; EDWARD SIMON, DC, an
23 individual; AFFILIATED HEALTH
24 CARE ASSOCIATES, P.C., an Illinois
25 Corporation; and DOES 1 through 30,
26 Inclusive,

27 Defendants.
28

CASE NO. : 2:15-cv-8205

COMPLAINT FOR:

(1) DECLARATORY RELIEF – NO
DUTY TO DEFEND UNDERLYING
CLAIMS AND

(2) EQUITABLE REIMBURSEMENT
OF ALL FEES, COSTS, AND
EXPENSES PAID BY TRAVELERS
TO DEFEND UNDERLYING
CLAIMS (*BUSS V. SUPERIOR
COURT*)

1 Plaintiff Travelers Property Casualty Company of America (“Travelers”) pleads
2 as follows:

3 **FIRST CAUSE OF ACTION**
4 **FOR DECLARATORY RELIEF –**
5 **NO DUTY TO DEFEND**
6 **UNDERLYING CLAIMS**
7 **(Against All Defendants)**

8 **Jurisdiction and Venue**

9 1. This Court has original subject matter jurisdiction because complete
10 diversity exists between the plaintiff, a Connecticut corporation with its principal
11 place of business and main administrative offices in Hartford, Connecticut, and
12 defendants, which are residents of the States of California and Illinois. 28 U.S.C.
13 §1332(a) and (c). In addition, the amount in controversy exceeds \$75,000. 28 U.S.C.
14 §1332(a).

15 2. This Court has personal jurisdiction over the defendants because they
16 have a continuous, systematic, and substantial presence within this judicial district
17 either as residents and/or plaintiff-litigants.

18 3. Venue is proper in this judicial district pursuant to 28. U.S.C. §1391(b)
19 and (c).

20 **Introductory Statement**

21 4. Plaintiff Travelers insured defendant Medversant Technologies, LLC
22 (“Medversant”) with several insurance policies. Medversant was sued in the Central
23 District of California and the Eastern District of Illinois for its alleged violation of the
24 Telephone Consumer Protection Act and the Junk Fax Prevention Act of 2005. The
25 underlying plaintiffs accuse Medversant of sending tens of thousands of unauthorized
26 “junk” faxes.

believes that these defendants are others with an interest in whether Travelers has a duty to defend Medversant here in the underlying actions. Travelers will amend this complaint to name these defendants when their true names are ascertained.

The Travelers Insurance Policies

11. CyberFirst Technology Errors and Omissions Liability Coverage:

From March 1, 2014 to March 1, 2015, Travelers insured Medversant with CyberFirst Technology Errors and Omissions Liability Coverage under policy No. ZPL-14P77079-14-I5. The policy includes CyberFirst Technology Errors and Omissions coverage (form PR T1 02 (Ed. 01 12)).

12. The policy provides that Travelers will defend the insured only for claims which are covered or potentially covered under the policy and not for those which are not.

13. The CyberFirst Technology Errors and Omissions Coverage further states:

This insurance does not apply to:

...

k. Violation of Consumer Protection Laws

Loss arising out of any actual or alleged violation of any unfair or deceptive trade practices, unfair competition, or other consumer protection law committed by or on behalf of an insured.

(Emphasis added.)

14. **Commercial General Liability Coverage:** From March 1, 2014 to March 1, 2015, Travelers also insured Medversant with policy No. No. ZLP-12T17027-14-I5. The policy includes Commercial General Liability coverage written on an “occurrence” or “offense” basis. Travelers also provided Medversant with substantively identical coverage for the four prior years beginning March 1, 2010,

2011, 2012, and 2013. Travelers also provided umbrella excess coverage to Medversant for these same five years.

15. Each of the commercial general liability policies provides that Travelers will defend the insured only for claims which are covered or potentially covered under it and not for those which are not.

16. The General Liability Coverage in place for the latter three of the five total years, March 1, 2012-March 1, 2015, further states in an endorsement (form CGD326 (Ed. 10-11)) titled “Exclusion – Unsolicited Communications” that the general liability coverage *“does not apply to”*:

EXCLUSION – UNSOLICITED COMMUNICATION

COVERAGE A BODILY INJURY AND PROPERTY DAMAGE

LIABILITY:

Unsolicited Communication

“Bodily injury” or “property damage” arising out of any actual or alleged *violation of any law that restricts or prohibits the sending, transmitting or distributing of “unsolicited communication”*.

* * *

COVERAGE B PERSONAL AND ADVERTISING INJURY LIABILITY:

Unsolicited Communication

“Personal injury” or “advertising injury” arising out of any actual or alleged *violation of any law that restricts or prohibits the sending, transmitting or distributing of “unsolicited communication”*.

The following is added to the DEFINITIONS Section:

“*Unsolicited communication*” means any communication, in any form, that the

1 recipient of such communication did not specifically request to receive.¹
 2 (Emphasis added.)

3 **The Underlying Actions, The Tenders to Travelers and Travelers'**
 4 **Agreement to Defend Under a Full Reservation of Rights**

5 17. On September 16, 2014, Medversant was sued in *Edward Simon, DC v.*
 6 *Healthways, Inc., etc., et al*, Los Angeles Superior Court Case No. 557772, removed
 7 to United States District Court (C.D. Cal.), Case No. 14-cv-08022 BRO (JCx) ("the
 8 California Action"). The first amended complaint states causes of action for:

9 (1) Violations of the Telephone Consumer Protection Act, 47 U.S.C. § 227, and
 10 FCC Regulations and

11 (2) Violations of Cal. Bus. & Professions Code § 17538.43.

12 The plaintiff in the California action alleges that Medversant sent some 14,000 illegal
 13

14 ¹ The general liability policies in place for the first two of the five years, March 1,
 15 2010-March 1, 2012, contain the January 2004 version of the "Unsolicited
 16 Communication" exclusion (form CGD326 (Ed. 01 04)). It is substantively identical
 17 to the latter version. It states:

18 **EXCLUSION – UNSOLICITED COMMUNICATIONS**

19 *This insurance does not apply to "bodily injury", "property damage",*
 20 *"personal injury", "advertising injury" or "website injury" arising out of*
 21 *unsolicited communications by or on behalf of any insured.* Unsolicited
 22 communications means any form of communication, including but not limited
 23 to facsimile, electronic mail, posted mail or telephone, in which the recipient
 has not specifically requested the communication. Unsolicited communications
 also include but are not limited to communications which are made or allegedly
 made in violation of the Telephone Consumer Protection Act and any
 amendments, and/or local or state statutes that bar, prohibit or penalize such
 communications.

24 (Emphasis added.) The excess / umbrella policies in place during the five years at
 25 issue also bar claims arising from "Unsolicited Communications" with substantively
 26 identical exclusionary endorsements. (See March 1, 2010-March 1, 2012 excess
 umbrella policies, at form UM 04 15 (Ed. 01 04), and March 1, 2012-March 1, 2015
 excess umbrella policies at form UM 04 15 (Ed. 10 11).)

1 faxes.

2 18. On December 22, 2014, Medversant was sued in a second action, *Affiliated*
3 *Health Care Associates, P.C., etc. v. Medversant Technologies, etc., et al.*, United States
4 District Court (E.D. IL), Case No. 1:14-cv-10247 (“the Illinois Action”). The plaintiff in the
5 Illinois Action sued Medversant under the Telephone Consumer Protection Act. The Illinois
6 plaintiff also sued under state statutes and under common law theories arising from
7 Medversant’s alleged widespread junk faxing. The Illinois Action was dismissed without
8 prejudice within a few months and the plaintiff there, Affiliated Health Care Associates,
9 P.C., joined the California Action as co-plaintiff. The California Action remains pending.

10 19. Medversant tendered the California Action and the Illinois Actions to
11 Travelers for defense. Despite the exclusions in the Travelers policies described
12 above which apply directly to all pending claims, Travelers agreed to defend
13 Medversant subject to a complete reservations of its rights, including reservations of
14 its right to seek this declaratory relief, to withdraw from the defense, and to seek
15 reimbursement of the fees, costs, and expenses of defenses if the Court finds that
16 Travelers did not owe a defense. Attached here as Exhibits 1 and 2, and incorporated
17 here by this reference, are copies of Travelers’ letters laying out the terms of the
18 various policies, its agreement to defend, and its reservation of all of its rights.
19 Exhibit 1 pertains to the California Action and Exhibit 2 to the Illinois Action.

20 **This Dispute**

21 20. Travelers has been defending Medversant in the California and Illinois
22 Actions since they were tendered to it.

23 21. Medversant continues to demand that Travelers pay for its defense in the
24 Underlying Action.

25 22. Travelers contends that it does not owe Medversant a defense in the
26 California Action, and never did, and that it did not owe it a defense in the Illinois

1 Action while that action was pending. Travelers asks that this Court declare that
 2 Travelers owes no such defense because: (1) the claims asserted there do not satisfy
 3 any of the insuring agreements in the various policies and, (2) if they did, any such
 4 arguable coverage would be negated by the exclusions cited above for claims arising
 5 from unsolicited communications or from actual or alleged violation of any consumer
 6 protection laws. Needless to say, violation of the Telephone ***Consumer Protection***
 7 ***Act*** is a violation of a ***consumer protection law***.

8 23. Travelers further contends that it has properly reserved its right to seek
 9 reimbursement of the defense fees, costs, and expenses it has incurred defending
 10 Medversant² and, therefore, under the holding of *Buss v. Superior Court*, 16 Cal. 4th
 11 35 (1997), Travelers is entitled to a judgment against Medversant for reimbursement
 12 of all sums Travelers has spent defending it in the underlying actions.

13 24. Travelers is informed and believes and, on that basis, alleges that
 14 Medversant and the other defendants contend to the contrary as to each of these
 15 matters.

16 25. Declaratory relief is appropriate and necessary and the Court should
 17 exercise its jurisdiction over this matter because Travelers has no other plan, speedy,
 18 and/or adequate remedy at law.

19 26. For the reasons stated above, Travelers requests that the Court enter an
 20 order and judgment declaring that, since their initial tenders to Travelers, Travelers
 21 has not been obligated to defend Medversant in the California Action or in the Illinois
 22 Action under any of the policies it issued to Medversant and, therefore, Travelers may
 23 stop paying for its defense there.

24
 25
 26 ² See, e.g. Exhibit 1, p. 15, last paragraph and Exhibit 2, p. 16, para. 5.

SECOND CAUSE OF ACTION
EQUITABLE REIMBURSEMENT OF ALL FEES,
COSTS, AND EXPENSES PAID BY TRAVELERS
TO DEFEND UNDERLYING CLAIMS
(BUSS V. SUPERIOR COURT)
(Against All Defendants)

27. Travelers incorporates the allegations of paragraphs 1 through 26 here as if restated.

28. Travelers has paid substantial sums for the attorneys' fees, costs, and expenses of defending Medversant in the California Action and the Illinois Action. Presently, this is more than \$254,905. Travelers did so in response to Medversant's demand that it do so and despite having doubts that it was obligated to do so.

29. Travelers provided this defense pursuant to a full reservation of its rights, including an express reservation of the right to seek reimbursement of all amounts Travelers paid toward defense.

30. Inasmuch as Travelers was not obligated to pay any, or at least not obligated to pay some, of the fees, costs, and expenses to defend Medversant in the underlying actions, Medversant and Does have been unjustly enriched. Under *Buss v. Superior Court*, 16 Cal. 4th 35 (1997), Travelers has a right of equitable reimbursement that is implied in law as quasi-contractual to receive reimbursement of all defense fees, costs, and expenses which it paid to defend Medversant in the underlying actions during the time it was not obligated to do so.

31. Travelers seeks a monetary judgment from Medversant and Does, jointly and severally, for all amounts which Travelers paid to defend Medversant in the underlying actions from the inception of those cases.

1 **PRAYER**

2 Wherefore, Travelers prays for an order and declaratory judgment against all
3 defendants and a monetary award against Medversant and Does as follows:

4 **First Cause Of Action For Declaratory Relief – No Duty To Defend**
5 **Underlying Claims**

6 1. For a declaration that Travelers had and has no duty to defend Medversant in
7 the California Action or the Illinois Action and that it may withdraw from
8 Medversant's defense;

9 **Second Cause Of Action For Equitable Reimbursement Of All Fees, Costs,**
10 **And Expenses Paid By Travelers To Defend Underlying Actions (*Buss v.***
11 ***Superior Court*)**

12 2. For a monetary award against Medversant and Does, jointly and severally,
13 for all amounts which Travelers paid and is paying to defend Medversant in the
14 California Action and the Illinois Action from the inception of each, which amounts
15 will be proven at trial; this amount currently exceeds \$254,905;

16 **All Causes of Action**

17 3. For costs of suit;

18 4. For all other relief which the Court finds just and proper.

19 Dated: October 20, 2015

20 Respectfully submitted,

21 /s/ Mark D. Peterson
22 **MARK D. PETERSON**
23 **Of CATES PETERSON LLP**
24 **Attorneys for Plaintiff**
25 **TRAVELERS PROPERTY CASUALTY**
26 **COMPANY OF AMERICA**